

Jim Giokas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ AUG 11 1998 ★
P.M. _____
TIME A.M. _____

-----X
JACK STEINBERG,

Plaintiff,

-against-

KENNETH S. APFEL,
Commissioner of Social Security,


Defendant.
-----X

JUDGMENT
97-CV-2791 (CBA)

A memorandum and order of the Honorable Carol B. Amon, United States District Judge, having been filed on August 3, 1998, denying the defendant's motion for judgment on the pleadings; denying the plaintiff's cross-motion for judgment on the pleadings; remanding the plaintiff's case to the administrative court and directing the Administrative Law Judge to assess plaintiff's mental condition in light of the treating physician rule and the regulations relating to major depression; it is

ORDERED and ADJUDGED that the case is remanded to the administrative court for further proceedings consistent with the Court's memorandum and order of July 31, 1998; and, that upon remand the Administrative Law Judge is directed to assess plaintiff's mental condition in light of the treating physician rule and regulations relating to major depression.

Dated: Brooklyn, New York
August 6, 1998


ROBERT C. HEINEMANN
Clerk of Court

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JACK STEINBERG,

Plaintiff,

NOT FOR PUBLICATION

- against -

MEMORANDUM & ORDER
97-CV-2791 (CBA)

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

AMON, U.S. DISTRICT JUDGE

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Introduction

Plaintiff Jeff Steinberg alleges that he has been disabled and unable to work since 1992, due to his depression and associated limitations. Plaintiff filed the instant action, pursuant to 42 U.S.C. § 405(g), after defendant Commissioner of Social Security determined plaintiff is not disabled and therefore, is not entitled to Social Security disability benefits. Plaintiff argues that defendant's determination is not supported by the evidence and should be reversed.

Currently before the Court are defendant's motion for judgment on the pleadings and plaintiff's cross-motion for judgment on the pleadings. Defendant asks the Court to remand plaintiff's case because the Administrative Law Judge ("ALJ") failed to develop the record with respect to plaintiff's mental

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condition. Plaintiff asks the Court to reverse defendant's decision because the administrative record contains ample evidence, from plaintiff's treating physicians and from consultative examiners, that plaintiff's mental condition makes him disabled. For the reasons discussed below, the Court remands plaintiff's case.

Background

Plaintiff filed an application for disability insurance benefits on April 17, 1992. His application was denied on June 24, 1992, and his request for reconsideration was denied on July 23, 1993. Plaintiff then filed a request for a hearing, and on July 14, 1994, ALJ David Nisnewitz conducted a de novo review of plaintiff's case.

ALJ Nisnewitz reviewed various reports and records from plaintiff's current treating source, Elmhurst Hospital; an evaluation from plaintiff's previous treating physician, Dr. Leonard Kresch; records from a detoxification at Booth Memorial Hospital in December, 1987; and reports from two Social Security consultative examiners, Dr. Oldan and Dr. Finger. Dr. Kresch, a physician at Elmhurst Hospital, indicated in a record dated May 1, 1992, that plaintiff was emotionally unable to concentrate and

to perform normal activities. In a record dated one week later, Dr. Armaga, also of Elmhurst Hospital, stated that plaintiff had no physical limitations. A consultative examiner, Dr. Mulcahy, examined plaintiff on June 13, 1992, and found that plaintiff was not disabled. Thereafter, Dr. Farooqui, a psychiatrist at Elmhurst Hospital, indicated in a record dated September 30, 1992 that plaintiff had marked difficulties in social functioning, including poor impulse control, poor social functions with his family, no friends, and poor attention and concentration. Approximately two months later, Dr. Farooqui also stated that plaintiff had difficulty understanding, remembering and carrying out complex or detailed job instructions, but could fairly understand, remember, and carry out simple job instructions. The records then indicate that plaintiff was examined by two Social Security consultative examiners on June 23, 1993. Dr. Oldan, a consultative psychiatrist, found that plaintiff appeared to understand, remember and carry out instructions. Dr. Oldan also indicated that plaintiff's capacity to stand pressure and relate to people appeared fair. Dr. Finger, a consultative physician, found that plaintiff had no gross difficulty in sitting, but may be mildly limited in the length of time he is able to stand and the distance he can walk, and moderately limited in his ability

to lift and carry. Approximately one year later, on July 13, 1994, Dr. Park, a psychiatrist at Elmhurst Hospital, stated that plaintiff was disabled from doing any work because, inter alia, he neglects his personal hygiene and food intake; is very irritable, argumentative, and explosive with profane language; has deficiencies of concentration and attention; has difficulty remembering instructions and following through on tasks; and has no ability to make occupational adjustments.

ALJ Nisnewitz also heard testimony from plaintiff and Dr. Gilbert Young, an orthopedist. Plaintiff testified that he last worked, as a carpenter, in the mid-1980s. From 1980 to 1985, he was on workers' compensation due to injuries he sustained when he fell from scaffolding and broke his ankles. Plaintiff subsequently went back to work on light duty, but he lost his job after his boss retired. Plaintiff did not immediately look for work, however, because he received a lump sum settlement for a lawsuit regarding the scaffolding fall. Plaintiff drank heavily during this time. Plaintiff testified that he did not cease drinking until 1992.

Plaintiff also testified that he has been unable to work since 1992, primarily due to depression and associated limitations. Plaintiff has seen a therapist or psychiatrist

approximately once per week since 1992, and has taken various medications for his depression, including Tofranil, Voltaren, Wellbutrin, and Desyrel. Plaintiff testified that he is sometimes so depressed he does not get out of bed. He also suffers from memory loss and has a hard time focusing on reading more than a page or two. He socializes only with members of his alcohol treatment group. He has a history of violent activity and repeat fighting. Of particular note is plaintiff's description of his volunteer work at the Elmhurst Hospital coffee shop. This work was part of plaintiff's therapy - plaintiff testified that his therapist thought that the volunteer work might help him with his impulsivity and his inability to socialize. Plaintiff testified that he was doing well at the job until "I got some bitch in [the] coffee shop." Apparently, plaintiff had a falling out with a supervisor and quit the job. Plaintiff testified, "She's lucky she didn't get a smack."

Dr. Young testified at the hearing as a medical expert. Dr. Young had never examined plaintiff, but he had examined the medical records submitted by plaintiff. Dr. Young testified that from an orthopedic point of view, plaintiff can perform light work, which would involve lifting no more than 20 pounds, frequently lifting and carrying up to 10 pounds, standing and

walking approximately 6 hours a day, and sitting intermittently the remainder of the time. Dr. Young stated that he did not feel comfortable testifying about plaintiff's psychiatric condition.

On July 25, 1995, ALJ Nisnewitz issued a decision finding that plaintiff was not disabled because plaintiff's past physical injuries did not prevent him from performing light work. ALJ Nisnewitz acknowledged plaintiff's mental problems, and the reports of plaintiff's treating physicians concerning those mental problems, but found that "the findings on mental status examination were inconsistent with the opinion and assessments. On mental status examination he was cooperative, able to concentrate and pay attention and was not suicidal. Also, the claimant denied having a depressive syndrome." ALJ Nisnewitz accordingly found that the opinions of plaintiff's treating physicians were not controlling because they were "not consistent with the medical findings, the assessments of the impartial consultants, the claimant's activities that include breeding show dogs, his ability to discontinue drug and alcohol use." Therefore, ALJ Nisnewitz concluded that substantial evidence existed in the record to support a finding that plaintiff was not disabled because he can perform light work.

The opinion of ALJ Nisnewitz subsequently became the final

decision of defendant.

Discussion

Judicial review of defendant's final decision is governed by 42 U.S.C. § 405(g), which states in pertinent part that:

[t]he court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive.

42 U.S.C. § 405(g) (1994); see also Diaz v. Shalala, 59 F.3d 307, 312 (2d Cir. 1995). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quotations omitted); see also Pratts v. Chater, 94 F.3d 34, 37 (2d Cir. 1996). In evaluating the evidence, "[t]he Court may not substitute its own judgment for that of the [Commissioner], even if it might justifiably have reached a different result upon a de novo review." Jones v. Sullivan, 949 F.2d 57, 59 (2d Cir. 1991) (quoting Valente v. Secretary of Health & Human Servs., 733 F.2d 1037, 1041 (2d Cir. 1984)). Therefore, the role of this Court is limited, and "substantial deference is afforded to the Commissioner's

decision." Saviano v. Chater, 956 F.Supp. 1061, 1067 (E.D.N.Y. 1997).

It is obvious from a review of ALJ Nisnewitz's opinion that defendant did not properly assess plaintiff's mental condition in light of the so-called treating physician rule, see 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (1997), and the regulations relating to major depression, see 20 C.F.R. §§ 416.920, 416.920a, 416.921, 416.945(c) (1997). Indeed, defendant concedes that "the ALJ's decision may be deficient due to legal error" and asks the Court to remand plaintiff's case for further administrative proceedings. Plaintiff, however, opposes a remand and asks this Court to reserve defendant's decision and award benefits.

A court should reverse an ALJ's decision in such a case only if "application of the correct legal standard could lead to only one conclusion." Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998). Upon reviewing the evidence in the record, the Court finds that reversal is not appropriate in the instant case because an ALJ, applying the treating physician rule and the regulations relating to major depression, could come to more than one conclusion. Although plaintiff's treating psychiatrists at Elmhurst Hospital state that plaintiff is disabled due to major depression, they do not provide any specific examples of episodes

where plaintiff's depression impeded his social functioning or ability to concentrate and complete tasks. The bases for their opinions are therefore unclear. An ALJ could ask plaintiff's psychiatrists to elaborate on their conclusions. See 42 U.S.C. § 1382c(a)(3)(G); 20 C.F.R. § 416.912(e). Depending on their responses, the ALJ could determine whether or not to give controlling weight to the opinions of plaintiff's treating physicians. This determination is by no means a foregone conclusion, because there is evidence contradicting the treating physicians' opinions. The consultative psychiatrist, Dr. Oldan, did not find that plaintiff suffered from major depression. Rather, Dr. Oldan found, inter alia, that plaintiff could understand instructions and withstand pressure. Moreover, plaintiff's own testimony indicates that he may be able to engage in daily activities that are inconsistent with major depression. Therefore, depending on the additional information elicited, an ALJ would not necessarily have to give the opinions of plaintiff's treating physicians controlling weight.


Accordingly, the Court cannot find that the application of the correct legal standards would lead to only one conclusion in plaintiff's case. The Court therefore denies plaintiff's request for a reversal and remands this case.

Conclusion

For the reasons set forth above, the Court remands this case to the administrative court. Upon remand, the ALJ is directed to assess plaintiff's mental condition in light of the treating physician rule and the regulations relating to major depression.

SO ORDERED.

Dated: Brooklyn, New York
July 31, 1998



Carol Bagley Anton
United States District Judge